

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 27 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

The Commission's Forfeiture Policy)
Statement and Amendment of Section)
1.80 of the Rules to Incorporate)
the Forfeiture Guidelines)

CI Docket No. 95-6

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COMMENTS OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED

The American Radio Relay
League, Incorporated

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SUMMARY

The American Radio Relay League, Incorporated, the national association of amateur radio operators in the United States, submits its comments in response to the Notice of Proposed Rule Making (the Notice), FCC 95-24, released February 10, 1995. The Notice proposes to adopt the Forfeiture Policy Statement which was, on procedural grounds, invalidated by the United States Court of Appeals for the District of Columbia Circuit in 1994. The Commission requests input on all aspects of the proposal, including the advisability of adoption of a standardized forfeiture schedule rather than use of a case-by-case approach to calculate forfeiture amounts.

The determination of the proper standardized amounts of monetary forfeitures categorized by rule violation type is but one small portion of the urgent need to visit monetary forfeiture procedures, and indeed the Commission's enforcement policies as a whole. The Commission's track record in recent years with respect to the few necessary enforcement actions needed in the Amateur Service is indeed dismal. There have been only a few cases that require Commission assistance, but in those cases prompt enforcement action was needed badly and quickly, to maintain the atmosphere of deterrence that represents a cornerstone of the tradition of self-regulation in the Amateur Service. Despite repeated promises, it was not forthcoming. The virtual absence of Commission enforcement efforts in the Amateur Service has resulted in a widespread view that the agency is a "paper tiger"; and image that must be dispelled without delay.

The Commission has probably arrived at a reasonable forfeiture schedule. The administration of that forfeiture schedule, however, is the more pressing matter. The issue is not whether the forfeitures will be paid voluntarily; there is a strong procedural disincentive to pay an administrative forfeiture, and an incentive to contest it. The issue is whether the standard amount of a forfeiture is sufficient to cause the rule violator to avoid the same behavior again, and at the same time, cause others who hear of it to avoid the same rule violation. While the schedule appears reasonable in this respect, it should be administered with deterrence as a goal.

Prudent administration of forfeitures as but one of the enforcement tools available to the Commission is in order. They should not be issued unless it is determined that the forfeitures are collectible, so that the Commission's credibility is not drawn into question: when a forfeiture is assessed, the licensee should understand that it is likely that it will be collected. Appropriate statutory and regulatory reforms are needed so that the disincentive to pay the forfeiture is removed, and the resolution of the proceedings expedited at the Commission.

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COMMENTS OF THE AMERICAN RADIO RELAY LEAGUE, INCORPORATED

The American Radio Relay League, Incorporated, the national association of amateur radio operators in the United States, by counsel and pursuant to Section 1.415 of the Commission's Rules (47 C.F.R. 1.415) hereby respectfully submits its comments in response to the Notice of Proposed Rule Making (the Notice), FCC 95-24, released February 10, 1995, 10 FCC Rcd. ____ (1995). The Notice proposes to adopt the Forfeiture Policy Statement (the Policy Statement)¹ which was, on procedural grounds, invalidated by the United States Court of Appeals for the District of Columbia Circuit in 1994. The Commission requests input on all aspects of the proposal, including the advisability of adoption of a standardized forfeiture schedule rather than use of a case-by-case approach to calculate forfeiture amounts. In support of the interests of the Amateur Radio Service in the Commission's enforcement of its rules, the League states as follows:

¹ Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd. 4695 (1991), recon. denied, 7 FCC Rcd. 5339 (1992), revised, 8 FCC Rcd. 6215 (1993); reversed on procedural grounds sub nom. United States Telephone Association, 28 F.3d 1232 (D.C. Cir. 1994).

**I. Introduction: Visible Enforcement Efforts Are Needed
In The Amateur Service Now**

1. The Commission's track record in the use of monetary forfeitures as a compliance measure in the Amateur Service (and in other services as well) has been dismal in recent years. This proceeding should be focused far more broadly than it is. It is insufficient merely to determine whether the Commission should adopt the proposed forfeiture schedule, some amended version thereof, or to utilize instead a case-by-case approach to the determination of forfeiture amounts. The Commission must also review the overall effectiveness of monetary forfeitures as an enforcement tool, given the procedural encumbrances thereon. There are a number of important aspects of this issue from the perspective of the Amateur Service.

2. The Amateur Service is, and has for the past four or five years been very much in need of some Commission assistance in a few specific, persistent enforcement cases. But almost no assistance has been forthcoming. The League's representatives have repeatedly met with the Commissioners and their staffs, the staff of the Compliance and Information Bureau at all levels, and before that with the Field Operations Bureau staff, to ask for some assistance with but a handful of cases that have proven impossible to resolve cooperatively. We have received some promises of action to resolve these few cases, but here has been none, and the problems persist visibly.

3. The Amateur Service is justifiably proud of its ability to maintain a high level of voluntary rule compliance, and to keep its

bands in order with very little expenditure of Commission resources. This tradition of self-enforcement, and the overall level of compliant behavior among amateurs has not deteriorated over the years. In fact, during recent years, times of intense growth in the Amateur Service, it is remarkable how well the tradition of self-enforcement in the Service has been sustained. There are now more than 650,000 licensees in the Amateur Service and the number of licensees is growing at a steady, rapid pace.

4. What has absolutely **not** kept pace is the Commission's support of these self-enforcement activities. In any group of more than 650,000 individuals, there will inevitably be at least a small minority which are intentionally and repeatedly not rule compliant. In the Amateur Service, the damage caused by each of these few individuals is unfortunately extremely visible, due to the frequency sharing characteristic of amateur radio. For example, for the past three years, the League has repeatedly and consistently importuned the CIB and its predecessor, FOB, to address two cases of repeated, persistent malicious interference and other rule violations. Despite repeated promises from numerous members of the CIB staff, the Commission has done absolutely nothing to address even these two cases. Each of these cases is approximately four years old. The perception in the minds of large numbers, perhaps the majority of active radio amateurs, due to the almost complete absence of any Commission enforcement presence is that the Commission is a "paper tiger" when it comes to enforcement of its own rules. The irony of the situation is that it would take

only a very few, occasional, but visible enforcement actions in the more egregious cases to promote significant compliance results. This has always been the case, and would be today, if there was any effort at deterrence on the Commission's part.

5. The practical result of the Commission's failure to enforce its rules in the Amateur Service is not only the continued presence of these problems, but worse, the encouragement to others to violate the same rules without fear of any penalty. Malicious interference problems, if left unchecked, tend to spread and increase in intensity. One important element of the fine tradition of rule compliance in the Amateur Service is simply a respect for the Commission and its rules, and a love for the avocation. That is widespread. The other important element, however, is that sense of deterrence which is now lacking: the perception that if the rules are obviously violated, the Commission will step in and issue a collectable forfeiture, suspend a license, or revoke a license. Some enforcement is an indispensable element of deterrence in the Amateur Service, and in this respect, over the past four or five years, the Commission has continually, and very visibly abdicated its responsibility to enforce its rules, and has let its public service-minded, rule-compliant amateur licensees down.

6. By specific written agreement with the Commission, the League sponsors the Amateur Auxiliary program, which both encourages voluntary rule compliance, and provides the Commission with a means of gathering evidence in cases in which a particular rule compliance problem cannot be resolved cooperatively. The

informational component of the Amateur Auxiliary has worked very well since the inception of the program in 1983, pursuant to the Communications Amendments Act of 1982². The Commission has not, however, used evidence gathered by participants in the program in difficult cases, however, despite its stated willingness to do so. The Commission has, quite literally, failed to keep its part of the agreement. The result has been a demoralized group of volunteers in the Amateur Service whose many, often hundreds of hours of work on a single, persistent enforcement problem has been ignored by Commission field offices. Routinely, evidence that is more than ample to support a needed forfeiture in a malicious interference case, for example, is allowed to grow stale; a year from the establishment of the violation, the evidence becomes useless. This is an intolerable squandering of a valuable resource of volunteers. The League cannot long support the program if it continues to be ignored by the Commission.

7. Nor is the often-heard "lack of available resources" excuse reasonable under the circumstances: the League has conducted a four-year effort to promote enforcement action in fewer than five cases nationwide. It is well understood that the Commission's resources for enforcement of its rules are limited, and that public safety communications services and their associated field problems take priority in allocating these scarce resources. However, the Commission cannot, consistent with its obligations under the Communications Act, ignore any radio service's enforcement needs

² Public Law 97-259, 96 Stat. 1087.

completely. See, e.g. 47 U.S.C. §§303, 309 and 501. The Commission must revisit its entire enforcement plan, not just establish a standardized forfeiture schedule and then conduct business as usual in the CIB, because "business as usual" is simply not working.

II. Monetary Forfeitures Are Presently An Inefficient Enforcement Tool

8. The Commission has an extremely difficult procedural burden in forfeiture matters. On the one hand, it would appear an expeditious enforcement tool because there is no administrative hearing requirement before the Notice of Apparent Liability or Notice of Forfeiture becomes effective as an administrative matter. The Commission can quickly **assess** a forfeiture in cases where such are justified by the circumstances. Indeed, in recent years, whether because administrative hearings are not required in forfeiture cases, or because of the Commission's traditional reluctance to revoke licenses, the issuance of forfeitures has significantly increased in certain radio services (other than the Amateur Service). At the time that the Commission accorded delegated authority to the Field Operations Bureau to assess monetary forfeitures in amounts up to \$20,000 each, the League was assured by the former Chief, FOB that there would be additional enforcement actions in appropriate cases in the Amateur Service. That, however, did not occur.

9. The tradeoff for the ability of the Commission to assess monetary forfeitures without administrative hearing, however, is that, pursuant to Section 504 of the Communications Act, the

Commission has no ability to collect its own forfeitures. It issues the notices of apparent liability, and if the subject of the forfeiture does not respond or submit payment, the matter is referred to the Attorney General of the United States for collection (47 U.S.C. §504) through a trial de novo. If the subject of the forfeiture chooses to avail itself of the administrative appeals process after the initial forfeiture notice is issued, it has at least two, if not three, opportunities to appeal the issuance of the forfeiture or the amount thereof, depending on whether or not the forfeiture is issued under delegated authority. Given typical timetables at the Commission, these forfeiture proceedings routinely take more than a year to simply resolve the appropriateness of the forfeiture, and the amount, as an administrative matter.

10. Even after the ample opportunities for administrative appeal of the forfeiture, the Commission is not free at that point to refer an uncollected forfeiture to the Attorney General of the United States for collection. There are required by Federal agency forfeiture collection procedures a series of "dunning letters" which take a significant amount of time to proceed through. Then, after all that, the matter is referred to the Attorney General for collection. These collection proceedings, notwithstanding the mandatory language of 47 U.S.C. §504, apparently involve the discretion of the offices of the United States Attorneys, and there does not appear a significant incentive for the institution of litigation to collect unpaid forfeitures. If they are being

collected, there is no public information of that fact, and the potential deterrence value of the fact of the collection of the forfeiture is indeed lost.

11. The Commission is forced to choose its enforcement action carefully, because, by statute, the Commission is not permitted to utilize the fact of the assessment of forfeitures in any Commission proceeding to the prejudice of the person accused of the violation, unless and until the forfeiture is paid or finally adjudicated. There is thus a significant disincentive to pay the forfeiture if there is any likelihood of other, additional proceedings against the licensee. This disincentive is enhanced by the fact that the administrative procedures available for appealing the assessment of a forfeiture are so long and cumbersome that it is preferable to contest a forfeiture, and delay for extensive periods of time the administrative resolution of it, than it is to pay it. Worst of all, however, is the widely held belief that it is highly unlikely that there will ever be a civil action instituted to collect the forfeiture. The perception is that the forfeiture amounts are too small, or the circumstances not sufficiently compelling, to justify the expenditure of the resources of the United States Attorneys, to collect the forfeitures. One of two things is true about this: either the Commission does not publicize the collection of assessed forfeitures from civil collection procedures, or the Attorney General of the United States is simply not actively collecting them to start with, contrary to the mandatory provisions of 47 U.S.C. §504. Either way, there is a widespread, and growing perception

that administrative forfeitures are not collectible. This is not a belief that is confined to the Amateur Service. It is, however, a factor in the persistence of a very few, but visible, compulsive, and antisocial rule violators in the Amateur Service. It is one reason why there is no deterrence to such behavior at the present time.

12. Actual experience validates the belief that monetary forfeitures are not likely of collection efforts. In a most compelling case of ongoing malicious interference in the New Orleans, Louisiana area involving Amateur Radio Repeaters, forfeitures issued to four licensees two years ago are, on information and belief, still not collected. The result has been that the interference problem has grown significantly in that area since then, in part because of the strong indication that the Commission is not willing to back up its enforcement actions once commenced.

III. Some Solutions

13. What is necessary in order to improve the use of monetary forfeitures as an enforcement tool? There are several. The first, from the perspective of the instant proceeding, is that monetary forfeiture amounts should be established as standards, as the Commission has proposed, so that licensees know in advance that the cost of a particular action is significant, and that the Commission will indeed assess the amount if presented with sufficient evidence of the violation. The amounts contained in the schedule in the

Notice are probably sufficient as far as the Amateur Service is concerned, keeping in mind that the service is entirely non-commercial, and any forfeitures are paid from post-tax dollars. The proper level of forfeiture is that which will cause a licensee not to repeat the rule violation, and at the same time serve to dissuade others from the same or similar behavior.

14. In the extremely few instances of issuance of forfeitures in the Amateur Service in the past five or six years, the amounts assessed, even for overt acts of malicious interference, have not been anywhere near the standard amounts for non-broadcast, non-common carrier violations set forth in the schedule. This leads the perpetrator to believe that even repeated rule violations in the Amateur Service are of little consequence and are taken lightly by the Commission. In one case involving indecent language, a forfeiture of \$2,000 was reduced to \$200, and even that amount was not paid by the licensee. The standard forfeiture in the schedule for such a violation is and has been \$5,000. There can be no deterrence created by such handling of amateur forfeiture cases.

15. In addition to establishing forfeiture amounts based on deterrence, rather than the likelihood of a licensee contesting the forfeiture, there are other elements of reform in the enforcement process that must be addressed right away. First of all, forfeitures, once assessed, must be followed up with collection efforts. While it is of course understood that the Commission cannot collect the forfeitures itself, it cannot responsibly assess a forfeiture without some idea of whether the office of the United

States Attorney responsible for collecting it will assist in collection of that particular forfeiture. To do otherwise is to create the situation which appertains now: the widespread belief that it is simply unnecessary to pay an assessed forfeiture. Forfeitures should not be overused as a remedy. They are but one of the remedies available to the Commission in compliance situations. When more forfeitures are issued than can possibly be collected by the United States Attorneys, or even processed administratively by the Commission on a timely basis, they tend to languish, and there is no deterrence created at all. Second offense violations, or serious violations involving malice, such as malicious interference, should be addressed differently, through license suspension or revocation, rather than by a forfeiture. The Commission should consult with the Attorney General of the United States before finalizing this proceeding, to determine what the abilities of that office are in support the Commission's issuance of forfeitures.

16. Another solution, and one which would inevitably require legislation, is the establishment of a procedure for private contractual collection of administrative forfeitures through civil litigation on behalf of the Commission. Expedited administrative review of the assessment of forfeitures would also be desirable. Another alternative would be to utilize to a greater extent the administrative hearing provisions of Section 503 of the Communications Act in forfeiture proceedings.

17. Finally, it is ironic that during the pendency of this proceeding, the Commission has just taken steps which signal a further de-emphasis of its proper role as the source of enforcement of its own rules. It has offered buyouts to a large portion of its field office staff, among which number some of the most dedicated employees of the Commission. The automating of the Commission's monitoring stations, and the closing of some of the field offices, is easy to perceive as a signal that the Commission cannot be relied upon to enforce even the most basic rules of interference avoidance. It is hoped that this perception will not prove accurate, but the Commission's track record in recent years lends support to those who are skeptical that any improvement in compliance will result from these recent actions.

IV. Conclusions

18. The determination of the proper standardized amounts of monetary forfeitures categorized by rule violation type is but one small portion of the urgent need to visit monetary forfeiture procedures, and indeed the Commission's enforcement policies as a whole. The Commission's track record in recent years with respect to the few necessary enforcement actions needed in the Amateur Service is indeed dismal. There have been only a few cases that require Commission assistance, but in those cases prompt enforcement action was needed badly and quickly, to maintain the atmosphere of deterrence that represents a cornerstone of the tradition of self-regulation in the Amateur Service, and, despite

repeated promises, it was not forthcoming. The result of the Commission's inaction in these few cases referred by the League to the Commission has not merely been the continuation of the rule violations, but also the encouragement of others to act similarly. The virtual absence of Commission enforcement efforts in the Amateur Service has resulted in a widespread view that the agency is a "paper tiger"; an image that must be dispelled without delay.

19. The Commission has probably arrived at a reasonable forfeiture schedule. The administration of that forfeiture schedule, however, is the more pressing matter. The issue is not whether the forfeitures will be paid voluntarily; there is a strong procedural disincentive to pay an administrative forfeiture, and an incentive to contest it. The issue is whether the standard amount of a forfeiture is sufficient to cause the rule violator to avoid the same behavior again, and at the same time, cause others who hear of it to avoid the same rule violation. While the schedule appears reasonable in this respect, it should be administered with deterrence as a goal. The history of the few forfeitures in the Amateur Service indicates that the Commission is not serious about compliance in that Service. Prudent administration of forfeitures as but one of the enforcement tools available to the Commission is in order. They should not be issued unless it is determined that the forfeitures are collectible, so that the Commission's credibility is not drawn into question: when a forfeiture is assessed, the licensee should understand that it is likely that it will be collected. Appropriate statutory and regulatory reforms are

needed so that the disincentive to pay the forfeiture is removed, and the resolution of the proceedings expedited at the Commission.

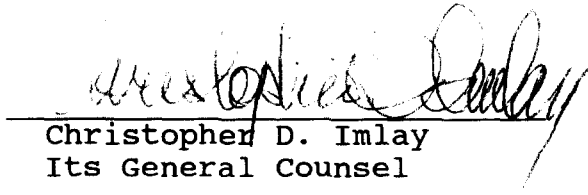
Therefore, the foregoing considered, the American Radio Relay League, Incorporated respectfully requests that the Commission adopt the forfeiture schedule set forth in the Notice, but also adopt needed reforms in the administration of monetary forfeitures in the Amateur Service and generally. It is also requested that the Commission provide the minimal necessary enforcement support for the Amateur Service in those cases which require such, on a periodic basis.

Respectfully submitted,

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